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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 685

THOMAS EDWARD FURLONG, HARRY SCOTT KNEEVERS and CHARLES JOSEPH SWARTZ,
Petitioners

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 350-356) is reported at 194 F. 2d 1.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1952 (R. 356) and a petition for rehearing (R. 357-366) was denied on March

4, 1952. The petition for a writ of certiorari was filed April 2, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether a supplemental charge to a deadlocked jury was rendered coercive by a sentence, to which no objection was raised at the time, directing the jury to continue its deliberations until it reached a unanimous verdict.

RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall

be given to make the objection out of the hearing of the jury.

STATEMENT

Petitioners, together with one Burns, were indicted in the United States District Court for the Northern District of Illinois on six counts charging them with obtaining money by impersonating federal officers on five separate occasions, in violation of 18 U.S.C. 912, and with conspiracy to violate that section (R. 2, 3-6). The jury found petitioners guilty on counts one and two, and count six, the conspiracy count. It acquitted petitioners on other substantive counts in which they were named, and returned a verdict of acquittal as to Burns (R. 301).[1] Petitioners were each sentenced generally to three years' imprisonment. The judgments were affirmed on appeal (R. 356).

As to petitioners, the Government adduced the following evidence bearing on their convictions on counts one and two:

On the evening of November 15, 1950, petitioners entered a tavern or roadhouse in Joliet, Illinois (R. 7-8, 14-15, 32, 36-37), stated they were from the F.B.I., and asked those present to produce identification (R. 7, 32-33, 38). They then sought out Carey Moore, the proprietor of the establishment (R. 8-9, 15, 32, 38). Petitioner Furlong, on

[1] After the jury had retired, but before the verdict was returned, the judge had granted a motion for acquittal as to Burns under Rule 29(b).

approaching Moore, said he was from the F.B.I., flashed a badge, and asked Moore whether he was running a house of prostitution (R. 16). When Moore replied in the affirmative, Furlong made further inquiries as to the number of girls employed and where they came from (R. 16-17). When Moore asked whether something could be done about his difficulties, Furlong, after some hesitation, replied, "Well maybe you can; we will see" (R. 18). Then, after consulting with the other petitioners, Furlong told Moore, in effect, that he would be all right if he paid $1,000 (R. 18). Moore was unable to pay that amount, but he did pay $900, after which Furlong assured him he "wouldn't be bothered any more" (R. 19-20). Petitioners then left the premises.

On the night of November 20, 1950, petitioners entered a house of prostitution in Wilmington, Illinois, run by a Julius Shlensky (R. 41-42, 49-50, 53-54, 57, 72). Petitioners again represented that they were from the F.B.I. (R. 42-43, 55), and indicated they were making a raid. When Shlensky asked if he could "straighten this out" (R. 43), Furlong replied, "How about $500?" Shlensky had only $135, which he paid to Furlong (R. 43). Petitioners then left the premises, taking along two of the girls to "make it look * * * official" (R. 43).

Petitioners did not deny that they had been in the two places named by witnesses for the Govern-

ment, nor that they had interrogated the proprietors about the nature of their businesses and their source of girls (R. 124, 195, etc.). They contended, however, that these visits were part of an investigation of prostitution which they were conducting for the Kefauver Committee (R. 100, 178-179, etc.); that they had not represented that they were agents of the F.B.I. (R. 181, 195); and that they never took any money (R. 117, 203).

At 11:10 on the morning of May 16, 1951, the jury retired to consider the evidence (R. 293). A recess was then taken until the return of the jury or until 3:00 o'clock (R. 295). When counsel and the judge met in chambers at 3:00 o'clock, the judge told counsel that he had been notified through the marshal that the jury was "hopelessly deadlocked and that there was no chance of an agreement regardless of how long they deliberated" (R. 295). The judge then announced his intention of giving "the charge in the Allen case" (R. 295) (*Allen* v. *United States,* 164 U.S. 492). During the colloquy which followed, it was suggested that the judge inquire whether the deadlock was as to any one individual, since presumably there was such a possibility as to Burns, but the judge stated he thought that might tend unduly to influence the jury and that he would not ask any questions of the jury as to their vote (R. 296-297). Counsel for petitioners objected generally to the giving of the *Allen* charge (R. 297).

The charge was delivered, as follows (R. 298-300):

> The manner provided by our Constitution and laws for deciding questions of fact in cases such as this is by a verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must, of course, be his own verdict—the result of his own convictions and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must come; and there is no reason to suppose that the case will ever be submitted to twelve persons, twelve men and women more intelligent, more impartial, or more competent to decide it, nor that more or clearer evidence will be produced on one side or the other. With this in view, it is your duty to decide the case if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one part[y] or the other,

in all cases. In the present case, the burden of proof—the burden is upon the Government to establish the guilt of the defendants beyond a reasonable doubt, and if you are left in doubt as to the guilt of the defendants, or any one of them, such defendant or defendants is entitled to the benefit of that doubt and must be acquitted. But, in conferring together you ought to pay proper respect to each other's opinions and reasons, with the disposition to be convinced with each other's arguments. And, on the one hand, if much the larger number of you are for a conviction the dissenting jurors should consider whether the doubt in their own minds is a reasonable one which makes no impression upon the minds of so many men and women equally honest, and equally intelligent, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if the majority of you are for acquittal, the minority should equally ask themselves whether they may not reasonably and ought to doubt the correctness of the judgment which is not concurred in by a number of those with whom they are associated and distrust the weight or sufficiency of that evidence which fails to carry conviction in the minds of their fellows.

> With that admonition you are directed to continue your deliberations until you arrive at a unanimous verdict. You will again retire to your jury room and continue your deliberations.

No objection was made to any part of the charge as given and the jury then retired. At 7:40 that evening, a verdict was reached (R. 301).

ARGUMENT

1. Petitioners, although admitting that the *Allen* instruction has found general acceptance, argue that the instruction in this case was rendered coercive by the sentence toward the conclusion, reading, "With that admonition you are directed to continue your deliberations until you arrive at a unanimous verdict" (R. 299-300). Standing alone, and read literally, that sentence might conceivably be construed as a command to dissenting jurors to abandon their position and side with the majority. However, in determining whether a charge is erroneous or prejudicial it is not enough to consider an isolated phrase; the charge must be viewed as a whole and the complained of portion put in its proper setting. See *United States* v. *Kaadt,* 171 F. 2d 600 (C.A. 7); *Moffitt* v. *United States,* 154 F. 2d 402 (C.A. 10), certiorari denied, 328 U.S. 853; *Eastman* v. *United States,* 153 F. 2d 80 (C.A. 8), certiorari denied, 328 U.S. 852.

A reading of the full charge in this case reveals that it was eminently fair to petitioners. At the outset the judge instructed that the verdict to which a juror agrees must not be "a mere acquiescence in the conclusion of his fellows," and that the jurors had a duty to reach a verdict if they could "conscientiously do so." The necessity of the Government's establishing the guilt of defendants "beyond a reasonable doubt" was reiterated with great care. And the sentence immediately preceding that now complained of admonished the jurors that if only a minority favored conviction they ought to reconsider in the light of the majority's decision to acquit.

As petitioners indicate (Pet. 14), there is no invariable formula, compliance with which validates an *Allen*-type charge. Thus, a supplemental charge in which the judge urged dissenting jurors not to be "bull-headed" or "stubborn" was upheld because the "context prevented it from being coercive." *Bord* v. *United States,* 133 F. 2d 313, 315 (C.A.D.C.), certiorari denied, 317 U.S. 671. In *United States* v. *Olweiss,* 138 F. 2d 798, 800, 801 (C.A. 2), certiorari denied, 321 U. S. 744, the trial judge had told a divided jury: "It is a simple question. You should not have the slightest difficulty in coming to an agreement on this. I am sure you cannot act like a boy and go in a corner and say, 'I have made up my mind and that is the end of it.' " To the contention that this language,

which goes considerably beyond that complained of here, was coercive, Judge Learned Hand answered: "A jury which felt itself coerced by such language would have lacked all independence of mind; would have been no better than a sounding board for any judicial whisper."

That this sentence did not seem coercive at the time it was given is demonstrated by the fact that petitioner's counsel, although he had previously voiced a general objection to the giving of any *Allen* charge, did not object to the language of the charge as given. There is nothing in the record to support the claim that counsel could not have objected in time for the judge to modify his instruction if he considered that advisable. The record does show that, immediately following the jury's retirement, counsel and the court participated in a colloquy in which no mention of the wording of the charge was made. (R. 300.)

One purpose of Rule 30 is to have counsel point out his objection in a form specific enough to enable the court to correct its error. See *Butler* v. *United States,* 188 F. 2d 24 (C.A.D.C.); *Billeci* v. *United States,* 184 F. 2d 394 (C.A.D.C.). This requirement is not met by an objection made to the charge as a whole before it is delivered. *Ziegler* v. *United States,* 174 F. 2d 439 (C.A. 9). The instant case is an apt illustration of the propriety of this rule for it is evident that the court had no intention of

coercing the jury and that, if the implications which are now sought to be read into the sentence had been called to its attention, any possible misunderstanding could have been cleared up at the time.

Petitioner contends further that the trial judge abused his discretion by giving the *Allen* charge after the jury had deliberated for only three and a half hours. In *Allis* v. *United States,* 155 U.S. 117, 123, however, this Court held that the time at which a jury should be recalled for the purpose of assisting it to resolve difficulties "must be left to the sound discretion of the trial court." It is certainly proper to give the *Allen* charge when the jury reports it is "hopelessly deadlocked." Convictions have been upheld where an *Allen*-type charge was given after the jury had deliberated a little over two hours, *United States* v. *Olweiss,* 138 F. 2d 798 (C.A. 2), and less than an hour and a half, *Haskins* v. *United States,* 163 F. 2d 766 (C.A.D.C.).